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The Honorable RICARDO S. MARTINEZ

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

WASHINGTON ASSOCIATION OF  
CHURCHES, et al.,

Plaintiffs,

v.

SAM REED, in his official capacity as  
Secretary of State for the State of  
Washington,

Defendant.

NO. CV06-0726 RSM

DEFENDANT REED'S  
SUPPLEMENTAL RESPONSE TO  
MOTION FOR PRELIMINARY  
INJUNCTION

**I. INTRODUCTION**

The Plaintiff Associations have filed a Supplemental Motion for a Preliminary Injunction which seeks to obscure the weakness of their legal arguments with dark speculation about hypothetical factual situations, generously seasoned with out-of-context quotes from deposition testimony. The question before the Court is not whether Washington's voter registration statutes could theoretically be implemented in such a way as to deny some individual her chance to vote in a particular election (practically the only issue addressed by the Associations), but whether the statutes themselves are so fundamentally flawed, and will cause such inevitable injury if applied, that state officials must be enjoined from implementing them even temporarily, while the Court sorts out the ultimate merits of the case. The Associations have not carried their burden of

1 showing that they (1) are likely to prevail on the merits, or (2) are in danger of suffering  
 2 irreparable harm, or (3) can craft a preliminary injunction that would provide effective or  
 3 meaningful relief.<sup>1</sup>

## 4 II. THE FACTS

5 As the Associations implicitly grant, the State and the counties have worked hard to  
 6 comply with the expedited discovery order and have provided the Associations with full and  
 7 complete information about Washington's voter registration program, through document  
 8 production, responses to interrogatories, and deposition testimony given by both state and county  
 9 employees. As would be expected, the discovery process reveals (1) that the State is well along in  
 10 implementing federal law (HAVA) through the adoption and implementation of RCW  
 11 29A.08.107 and related State statutes and (2) that there have been relatively infrequent problems  
 12 in the implementation process, nearly all of them corrected and nearly all of the remainder  
 13 "correctable." The Associations' description of the registration process could be more fairly  
 14 restated as follows:

- 15 • A voter registration applicant<sup>2</sup> submits a complete voter registration form, which requires  
 16 the applicant to supply certain information (name, residence address, date of birth, one of  
 17 the identifying numbers required by HAVA, and signature on an oath affirming U. S.  
 18 citizenship and eligibility to vote). The county enters the information provided into the  
 19 county registration system.
- 20 • As required by HAVA, the applicant is directed to, in the following order of preference,  
 21 either (1) provide a state drivers license number or an equivalent identification number  
 22 issued to non-drivers, or (2) provide the last four digits of the applicant's social security  
 23 number, or (3) check a box stating that the applicant has neither of these two numbers.

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 26 <sup>1</sup> The "effective relief" issue was extensively briefed in the Defendant's initial Response, and will not be repeated here.

<sup>2</sup> Most applicants meet the constitutional requirements to vote; some do not.

- 1 • If the applicant “checks the box” indicating no drivers license number or social security  
2 number, the applicant is registered to vote but subject to a requirement (contained both in  
3 HAVA and in state law) to produce alternative identification at the time of the election  
4 (or sooner).
- 5 • If the applicant gives a drivers license (DOL) number or the last four digits of the social  
6 security (SSA) number, the state checks the number given against the DOL database, or  
7 the SSA database (as appropriate). If the number matches a number in the database, the  
8 applicant is registered to vote as of the date of her application.
- 9 • If the number given by the applicant does not match a number in the DOL or the SSA  
10 database, the state places the applicant in a “pending” status as to the state voter  
11 registration database and returns the information to the county for further processing.<sup>3</sup>
- 12 • If information is returned to the county for “failure to match,” the county checks for  
13 obvious problems like data entry errors or transpositions of names or numbers. Many  
14 counties also use alternative information available to them (information databases  
15 provided by the state, marriage and property records) to resolve the “non-match.” This  
16 process often allows the county to find information about the applicant which can be used  
17 to “match” the DOL or SSA number given. If so, the applicant is registered to vote.
- 18 • If no “match” can be found after additional county effort, the county mails a notification  
19 form to the applicant informing her of the situation and asking for additional information  
20 to resolve the situation. (Counties often contact applicants by telephone and/or email in  
21 addition to the mailed notice.) If the applicant responds and produces identification  
22 (which could be a corrected DOL or SSA number, a corrected name or date of birth, or  
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25 <sup>3</sup> The State does not use the term “fatal pending” for such applicants. Some counties use this term in  
26 managing their individual databases. The term “fatal pending” should not be construed as implying that the  
applicant is in jeopardy of capital punishment, or that the application is doomed to be cancelled. At this point, the  
application is still very much alive.

1 alternative identification establishing eligibility to vote), the applicant is registered to  
2 vote.

- 3 • If the applicant does not respond to the written notice, or offers no documentation  
4 establishing voter eligibility, the application is *subject to cancellation* 45 days after the  
5 written notice is sent. Most counties hold the applications open much longer than 45  
6 days. State law does not prevent counties from accepting and processing information  
7 provided even after the 45-day period.<sup>4</sup>
- 8 • If an election occurs within the 45-day period after the notice is sent, an applicant in  
9 “pending” status may provide information to complete the application up to and including  
10 the day of election, the registration will be active as of the date of the original application,  
11 and the applicant’s vote will be counted. Most counties will accept such information  
12 even after Election Day, until the election results are certified.
- 13 • Nothing precludes any applicant from filing a new registration application at any time,  
14 supplying new information which will facilitate the registration process, including the  
15 federal “matching” requirement. Even if the statutory deadline for registering for a  
16 particular election has passed, the applicant will be registered and entitled to vote in all  
17 subsequent elections.

18 It appears that only a very small number of registration applications have been “cancelled”  
19 since January 1, 2006, when RCW 29A.08.107 took effect—as of late July, only about 135. *See*  
20 *Overstreet Suppl. Decl., Ex. A (list of cancelled registrants).*<sup>5</sup> This number will undoubtedly grow  
21 by the end of the year, but it is far short of the “tens of thousands” described in the Complaint  
22 which commenced this case. Furthermore, the Associations are not warranted in suggesting that  
23 these numbers represent “disenfranchised” voters. The number could include (1) applicants who

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25 <sup>4</sup> The Associations are mistaken in asserting that state law prohibits counties from resolving errors or  
processing applications more than 45 days after the notice is transmitted. Pls.’ Suppl. Mot. for Prel. Inj. at p. 5.

26 <sup>5</sup> As the Court can see, the list of cancelled registrants does not have a disproportionately high number of  
seemingly Asian or Hispanic last names. The Associations’ concerns about disparate impact on minority voters  
appear to be misplaced.

1 moved after filing their application and were therefore no longer eligible to vote at that address;  
2 (2) applicants who failed to provide a sufficient address at which they could be reached; (3)  
3 applicants who failed to provide a date of birth, a signature, or the signed oath on the application  
4 form; or (4) applicants who supplied an identification number (DOL or SSA) which could not be  
5 matched and then failed to respond to the follow-up letter or were unable to supply any alternative  
6 identification. The number could also include fictitious or "joke" applicants, or applicants who  
7 were not U. S. citizens or not yet 18 years old. Yet, the Associations invite the Court to assume  
8 that any "non-matched" applicant is in fact qualified to vote, and that there is no legal or policy  
9 justification for failing to register every single applicant. In fact, the Associations have not  
10 identified a single applicant who meets the constitutional and statutory qualifications to vote but  
11 whose application has been "cancelled" by a county solely because the identification number  
12 given by the applicant cannot be matched with the DOL or SSA database. Nor have they  
13 established a substantial likelihood that such a case will occur before or during the 2006 election  
14 cycle.

15 The most the Associations have shown is that it is theoretically *possible* (though highly  
16 unlikely) that an otherwise qualified voter might not be registered because of a "matching"  
17 problem with the HAVA identification number, and theoretically possible (though even more  
18 unlikely) that this could happen through no fault of the applicant (as by failing to provide the  
19 correct information, or to respond to the county's letter). This problem, if it exists, is a problem  
20 with the application of the voter registration process in particular cases, and certainly does not  
21 show the facial invalidity of Wash. Rev. Code § 29A.08.107. The Associations have failed to  
22 show that the strong medicine of enjoining implementation of the state statute is necessary or  
23 appropriate.

1 **III. ARGUMENT**

2 **A. The Associations Are Unlikely To Prevail On The Merits**

3 The Associations contend that a particular Washington statute, Wash. Rev. Code §  
4 29A.08.107, is invalid because it conflicts with the federal requirements imposed by HAVA  
5 and certain other federal laws. The Secretary of State's position is that the state statute in  
6 question was specifically enacted to comply with HAVA. The Associations' reading—that  
7 HAVA *prohibits* statutes such as Wash. Rev. Code § 29A.08.107—is the least plausible of  
8 several possible readings.

9 **1. HAVA § 303(a)(5)**

10 It is indisputable that HAVA requires any applicant to vote in federal elections to  
11 provide, the applicant's current and valid driver's license number (if the applicant has such a  
12 license), or (if the applicant has no driver's license), the last four digits of the applicant's social  
13 security number. 42 U.S.C. § 15483(a)(5)(A)(i). Applicants who have neither a driver's  
14 license nor a social security number are assigned unique voter registration numbers by the  
15 State. 42 U.S.C. § 15483(a)(5)(A)(ii). It is also undisputed that HAVA requires the states to  
16 attempt to "match" the identification number provided by the applicant with either the state's  
17 own driver's license records or with the records maintained by the Social Security  
18 Administration, as the case may be. 42 U.S.C. § 15483(a)(5)(A)(iii) and (a)(5)(B).

19 HAVA is not perfectly clear as to what legal consequences flow if the applicant does  
20 provide a DOL or SSA number but the State is unable to match that number with any record in  
21 the DOL (or SSA) database. The question has four possible answers:

- 22 1. The State may not register the applicant if the ID number cannot be matched, even if  
23 the applicant provides alternative identification.
- 24 2. The State may register the applicant in question, but only if and when the applicant  
25 provides alternative documentation.
- 26 3. The State may register even a "nonmatching" applicant if state law so permits.

1 4. The State *must* register even a “nonmatching” applicant, whether or not alternative  
2 documentation is provided.

3 Washington is in compliance with HAVA if any of the first three readings are correct. The  
4 Associations cannot prevail in their HAVA argument unless the fourth reading is accepted.  
5 The four readings will be discussed briefly in turn.

6 First reading—HAVA requires a “match” for any applicant who has a DOL or an SSA  
7 number. This is a perfectly plausible way of reading HAVA § 303(a)(5), because it gives full  
8 meaning to the language indicating that applicants who have driver’s licenses (or, secondarily,  
9 social security numbers) must provide those numbers, and the language requiring the State to  
10 “match” the numbers with information in the appropriate state or federal database. Strictly  
11 read, this section of HAVA does not provide for the use of any alternative form of  
12 identification if an applicant in fact has a driver’s license and/or a social security number.<sup>6</sup>  
13 This is not the approach Defendant Reed would voluntarily use but HAVA might be  
14 interpreted to require it.

15 Second reading – HAVA permits States to register “nonmatching” applicants if they  
16 provide alternative documentation. This is Washington’s preferred reading of HAVA §  
17 303(a)(5), because it fully respects HAVA’s clear mandates (that identification numbers be  
18 provided and that states seek to verify them), but allows flexibility if the State cannot verify the  
19 number originally provided by the applicant. If the applicant can show that she is a real person  
20 meeting the appropriate qualifications to vote, the applicant should be registered. This reading  
21 thus satisfies the spirit of HAVA, and is not directly inconsistent with its letter. This reading is  
22 also consistent with Wash. Rev.Code § 29A.08.170, and underlies the rules implementing the  
23 statute as adopted by the Secretary of State. WAC 434-324-040.

24 Third reading—States may register “nonmatching” applicants if consistent with State  
25 law. Unlike the two earlier readings, this interpretation of HAVA (like the fourth reading

26 <sup>6</sup> The depositions of county officers revealed that some of them have adopted this reading of HAVA.

1 discussed below) is in conflict with HAVA's clear requirement that states "match" the  
 2 numbers provided by the applicant. Why must the State try to match the numbers if the State  
 3 can ignore the result and register the applicant anyway?

4 Fourth reading—HAVA requires States to register "non-matching" applicants whether  
 5 or not they provide alternative documentation. The State statute is inconsistent with HAVA  
 6 only if this reading is adopted, because only under this reading does HAVA command  
 7 anything that State statute prohibits: the registration of an applicant who has not provided any  
 8 satisfactory documentation of the types listed in HAVA. This reading relegates the HAVA  
 9 matching process into a wasteful and meaningless ritual, since even applicants who fail to  
 10 match will be registered. The Associations offer no analysis of HAVA § 303(a) showing why  
 11 this strained interpretation should be adopted.<sup>7</sup>

## 12 2. HAVA § 303(b)

13 The Associations' primary argument appears to be that HAVA § 303(b) should be read  
 14 as obligating States to register voters who fail the "matching" test set forth in § 303(a)(5) of the  
 15 same federal statute. This reading is inconsistent with the plain language of HAVA § 303(b).  
 16 This language imposes additional obligations on first-time voters who register by mail, and  
 17 does not entitle anyone to vote who has not met the registration requirements set forth in §  
 18 303(a)(5) or in State law.

19 HAVA § 303(b) contains three parts which work together as follows: § 303(b)(1)  
 20 requires first-time voters who registered by mail to produce documentation of their identity the  
 21 first time they vote. The acceptable documentation is set forth in § 303(b)(2). Finally, §  
 22 303(b)(3) defines a category of voters who are excused from the duty to provide identification  
 23 when they vote.

24  
 25  
 26 <sup>7</sup> Courts avoid interpreting statutes in such a way that portions of the statute are rendered meaningless.  
*Schneider v. Chertoff*, 450 F.3d 944, 954 (citations omitted) (9th Cir. 2006).

1 It is important to note that HAVA § 303(b) applies only to individuals who “registered  
 2 to vote in a jurisdiction by mail.” 42 U.S.C. § 15483(b)(1)(A). *This subsection has no*  
 3 *applicability to applicants who never completed the registration process.*<sup>8</sup> Thus, § 303(b)(2)  
 4 imposes additional requirements on individuals who have previously registered to vote by  
 5 mail: they must present identification (as described) at the polls if they vote in person, and they  
 6 must submit identification (as described) with their ballot if they vote by mail. Furthermore, §  
 7 303(b)(3) provides that individuals who have already submitted appropriate ID (including  
 8 drivers license numbers or social security numbers which “match”) *when they registered* are  
 9 then excused from the requirement of providing documentation again when they vote. Nothing  
 10 in HAVA § 303(b) suggests that State registration laws are overridden or that individuals who  
 11 are otherwise subject to registration requirements may nonetheless vote without being  
 12 registered.<sup>9</sup> Finally, there is no way to read HAVA § 303(b) as requiring states to register first-  
 13 time voters who present ID upon voting; this subsection simply does not cover the subject of  
 14 voter registration.

### 15 3. Voting Rights Act

16 The Associations also suggest that Wash. Rev. Code § 29A.08.170 violates the federal  
 17 Voting Rights Act, specifically 42 U.S.C. § 1971(a)(2)(B) (emphasis added), which provides:

18 No person acting under color of law shall . . . deny the right of any individual to  
 19 vote in any election because of an error or omission on any record or paper  
 20 relating to any application, registration, or other act requisite to voting, if such  
 error or omission is *not material* in determining whether such individual is  
 qualified under State law to vote in such election.

21 Nothing in Wash. Rev. Code § 29A.08.170 requires any person to deny anyone the  
 22 right to vote in an election based upon a “nonmaterial” error or omission in a registration  
 23 application. First of all, the Associations have not carried their burden of showing that the  
 24 reasons for cancellation are “nonmaterial”—that is, they have not shown that the fewer than

25 <sup>8</sup> It also has no applicability to individuals who originally registered in person.

26 <sup>9</sup> Certain voters (such as military personnel and overseas voters) are entitled to vote without registering  
 and without providing documentation. 42 U.S.C. § 15483(b)(3)(C). These voters are not at issue in this case.

1 200 cancelled applicants are, in fact, entitled to register and vote. It is far more likely that most  
 2 of the cancelled applications reflect applicants who are not entitled to register and vote in  
 3 Washington because, for example, they moved out of Washington after sending in their  
 4 application. *See* Overstreet Suppl. Decl., Ex. B (Census figures on out-of-state moves of  
 5 former Washington residents). The Associations cannot meet their burden by simply assuming  
 6 that every cancelled application denies voting rights to a qualified voter.

7 The information required on the Washington voter registration application form is  
 8 either “material” (information showing the applicant’s age, citizenship, residence for instance,  
 9 or information necessary to meet HAVA’s “matching” requirement) or, if it is nonmaterial  
 10 (such as the applicant’s phone number or e-mail address), it would not be a basis for denying  
 11 the application. Anyone denying an application based on a nonmaterial error or omission  
 12 would not be acting under color of state law.<sup>10</sup> Again, the most the Associations could show is  
 13 the possibility that imperfect implementation of the state’s voter registration laws could result  
 14 in a denial of voting rights. This is not a basis for a facial attack upon the statute.<sup>11</sup>

15 **B. The Associations Have Shown No Harm Justifying Injunctive Relief**

16 Although the Associations allege that their injuries in this case are “present, real,  
 17 continuing and unavoidable” (Pls.’ Suppl. Mot. for Prel. Inj. at 21-22), they have not offered  
 18 anything beyond speculation about hypothetical future injuries. It is worth noting that not one  
 19 of the plaintiffs in this case is an individual who has unsuccessfully sought to register to vote in  
 20 Washington. Not one is an individual who meets all constitutional and statutory qualifications  
 21 but has a basis to believe that her registration would be prevented by the implementation of

22 \_\_\_\_\_  
 23 <sup>10</sup> The primary purpose of the Voting Rights Act is to implement the Fifteenth Amendment barring  
 24 discrimination based on race or previous condition of servitude. *United States v. Mississippi*, 380 U.S. 128  
 (1965). The Associations have made no showing that Washington’s voting registration laws are discriminatory,  
 either by intent or operation.

25 <sup>11</sup> The Associations assert that a registration system that results in one single improperly cancelled  
 26 registration violates the law. *See* Pls.’ Suppl. Mot. for Prel. Inj. at 5 (“No error rate is acceptable ....”). Every  
 state’s registration system will have at least one mistake. Therefore, if the Associations are correct, then the voter  
 registration systems in all fifty states and the territories should similarly be declared to be unlawful. The Court  
 should not accept the Associations’ invitation to so hold.

1 Wash. Rev. Code § 29A.08.107. The best the Associations can do is *assume* that every single  
2 cancelled registration is improper because every single applicant is eligible to register and vote,  
3 and invite the Court to make the same assumption. However, the Associations have not shown  
4 that Washington's statutes will provide any significant barrier in realizing their stated goals. If  
5 difficulties arise in processing the registration application for any individual, they can be  
6 confronted on a case-by-case basis, and do not require a frontal assault on Washington's voter  
7 registration system.

8 **C. The Burden Of Proof Is High**

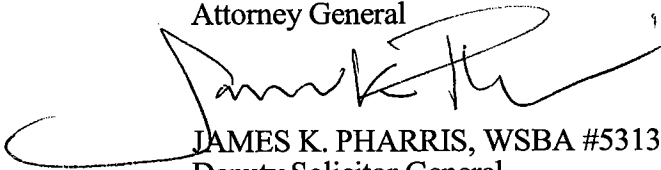
9 An injunction is a "harsh and drastic" remedy, requiring the moving party to make a  
10 "clear showing" of entitlement to it. *See* Def. Reed's Resp. to Mot. for Prel. Inj. at 11-12  
11 (citing cases). This is especially true in election cases: "Interference with impending elections  
12 is extraordinary." *Id.* at 12 (citing case).

13 **IV. CONCLUSION**

14 For the reasons discussed above, the Court should deny Plaintiffs' Motion for  
15 Preliminary Injunction.

16 DATED this 21<sup>st</sup> day of July, 2006.

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